(6)

QUESTION PRESENTED

Where California has created a liberty interest in parole that, after two-plus decades of rehabilitation both prohibits parole denial solely on the basis of the commitment offense or other aged and static factors, and unless the parole applicant is presently dangerous as determined by application of specific guiding criteria, may a federal court grant habeas relief under the Due Process Clause of the United States Constitution where the California Governor arbitrarily reversed a grant of parole by the parole board based solely on a 1977 offense committed by a juvenile?

PARTIES TO THE PROCEEDING

The parties listed in the caption of the petition for a writ of certiorari and in the caption of this brief are parties in this action. Petitioners filed a consolidated petition arising out of separate habeas corpus judgments in the court below concerning the entitlement of five California prisoners to parole dates. As to one of the five respondents, Ron Mosley, the judgment has since been withdrawn, and he is no longer a party. Petitioner Matthew Cate is the Secretary of the California Department of Corrections and Rehabilitation (CDCR) and has constructive custody of Respondents John Pirtle, Robert Johnson, and – since the week of February 21, 2011 – Anthony Sneed, rather than the wardens who had custody during the pendency of the underlying litigation. Respondent Slater is no longer in the physical or constructive custody of the CDCR, but Secretary Cate is the state official serving as a petitioner in this matter.

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[1] Sections 2280 et seq. apply to prisoners sentenced for murders committed before November 8, 1978. Cal. Code Regs., tit. 15, § 2400.

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IN THE

Supreme Court of the United States

BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Besides the federal statutory provision identified by Petitioners as relevant, this case also implicates the federal constitutional and state statutory and regulatory provisions identified below:

United States Constitution, Amendment XIV.
... [N]or shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Penal Code Section 3041 (a), (b)[3].
(a) In the case of any inmate sentenced pursuant to any provision of law, other than Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2, the Board of Parole Hearings shall meet with each inmate during the third year of incarceration for the purposes of reviewing the inmate's file, making recommendations, and documenting activities and conduct pertinent to granting or withholding postconviction credit. One year prior to the inmate's minimum eligible parole release date a panel of two or more commissioners or deputy commissioners shall again meet with the inmate and shall normally set a parole release date as provided in Section 3041.5. ... The release date shall be set in a manner that will provide uniform terms for offenses of similar gravity and magnitude with respect to their threat to the public, and that will comply with the sentencing rules that the Judicial Council may issue and any sentencing information relevant to the setting of

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[3] Parts of this penal code section irrelevant to Johnson's case have been omitted.

parole release dates. The board shall establish criteria for the setting of parole release dates and in doing so shall consider the number of victims of the crime for which the inmate was sentenced and other factors in mitigation or aggravation of the crime. ...

(b) The panel or the board, sitting en banc, shall set a release date unless it determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual, and that a parole date, therefore, cannot be fixed at this meeting. After the effective date of this subdivision, any decision of the parole panel finding an inmate suitable for parole shall become final within 120 days of the date of the hearing ... unless the board finds that the panel made an error of law, or that the panel's decision was based on an error of fact, or that new information should be presented to the board, any of which when corrected or considered by the board has a substantial likelihood of resulting in a substantially different decision upon a rehearing. ...

California Code of Regulations, Title 15, Sections 2280-90.
(See appendix to this opposition for these regulations.)

California Code of Regulations, Title 15, Sections 2400-11.
(See appendix to this opposition for these regulations.)

California Constitution, Article V, Section 8(b).
No decision of the parole authority of this State with respect to the granting, denial, revocation, or suspension of parole of a person sentenced to an indeterminate term upon conviction of murder shall become effective for a period of 30 days, during which the Governor may review the decision subject to procedures provided by statute. The Governor may only affirm, modify, or reverse the decision of the parole authority on the basis of the same factors which the parole authority is required to consider. The Governor shall report to the Legislature each parole decision affirmed, modified, or reversed, stating the pertinent facts and reasons for the action.

INTRODUCTORY STATEMENT

The court of appeals granted habeas corpus relief based on a determination that the State courts unreasonably failed to remedy Johnson's unconstitutional imprisonment in accordance with clearly established federal law. The last reasoned state court decision concluded that the circumstances of the commitment offense alone established that Johnson "would represent an unreasonable threat to public safety if released." Petn. App. p. 94a[4].

In order to understand the correctness of the decision below under this Court's own precedents, it is necessary to understand certain fundamentals of California parole law. Under California law, when a defendant is sentenced to an indeterminate term with a minimum parole eligibility date (MEPD), a parole date "normally shall" be fixed one year before the MEPD arrives, Cal. Pen. Code, § 3041 subds. (a) & (b), unless "the prisoner will pose an unreasonable risk of danger to society if released from prison." Cal. Code Regs., tit. 15, § 2402, subd. (a); *see also In re Rosenkrantz*, 29 Cal.4th 616, 653-54 (2002) (describing regulatory scheme).

Under this statutory scheme, the setting of a parole date early in the prisoner's incarceration is the rule while deferral of a parole date is the exception. *See In re Lawrence*, 44 Cal.4th 1181, 1211 (2008) ("[T]he Board's authority to make an exception to the requirement of setting a parole date ... should not operate so as to swallow the rule that parole is

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[4] Petn. App. refers to the appendix filed with the petition for writ of certiorari. App. will refer to the appendix filed with this opposition to that petition.

'normally' to be granted") (internal punctuation omitted); *In re Scott*, 15 Cal.Rptr.3d 32, 45 (Cal. Ct. App. 2004) ("parole is the rule, rather than the exception"). "Accordingly, parole applicants ... have an expectation that they will be granted parole unless the Board finds, in the exercise of its discretion, ... that they are unsuitable for parole in light of the circumstances specified by statute and by regulation." *In re Rosenkrantz*, 29 Cal.4th at 654 (citing Cal. Penal Code § 3041 (a), Cal. Code Regs., tit. 15, §§ 2401-2402).

After a prisoner's MEPD has passed, and he has a well-established record of rehabilitation and reform shown by conforming behavior, program and work participation evidencing responsibility, growth and maturity, and psychological health including pro-social attitudes and lack of mental instability or diagnosed mental conditions, parole cannot be denied solely on the basis of even an aggravated commitment offense. *In re Lawrence*, 44 Cal.4th at 1211 ("the underlying circumstances of the commitment offense alone rarely will provide a valid basis for denying parole when there is strong evidence of rehabilitation and no other evidence of current dangerousness"), 1227 ("mere recitation of the circumstances of the commitment offense, absent articulation of a rational nexus between those facts and current dangerousness, fails" to establish unsuitability for parole). Thus, the circumstances of the commitment offense, standing alone, cannot establish the current unreasonable risk of dangerousness required to deny parole.

The assessment of a prisoner's current dangerousness depends upon his progress and his current "psychological or mental attitude," not historical relics that have become so attenuated to current dangerousness

that they lack probative value on the question. *In re Lawrence*, 44 Cal.4th at 1221. That is, the individualized consideration of an inmate's parole suitability required by statute, *Lawrence* at 1222, must include the "passage of time" and changes in the person's conduct and attitude. *Id.* 1212-1213.

The parole decision for a prisoner convicted of murder is made by the Board of Parole Hearings (Board)[5] and the Governor[6] who must "apply detailed standards when evaluating whether an individual inmate is unsuitable for parole on public safety grounds." *See In re Dannenberg*, 34 Cal.4th 1061, 1095, n.16 (2005); *accord, Rosenkrantz*, 29 Cal.4th at 677 (the parole decision must "reflect[] due consideration of the specified factors as applied to the individual prisoner in accordance with applicable legal standards"); *see also* Cal. Pen. Code §§ 3040-3042, 3046, 3049, 3052; Cal. Code Regs., tit. 15, § 2402 (enumerating the detailed standards).

The Governor must apply the same factors and review the same materials as the Board that made the parole decision being reviewed. *See In re Gray*, 59 Cal.Rptr.3d 724, 735 (Cal. Crt. App. 2007) (Governor's

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[5] The agency was called the Board of Prison Terms until 2005, when the name was changed to the Board of Parole Hearings. Cal. Pen. Code § 5075.

[6] Respondent may collectively refer to the Board and Governor as the "parole authority." "The governing statutes provide that the Board is the administrative agency within the executive branch that generally is authorized to grant parole and fix releases ...." *In re Rosenkrantz*, 29 Cal. 4th 616, 653 (Cal. 2002). Article V, section 8 (b) of the California Constitution, as already set forth, gives the Governor power to review the Board's decisions for convicted murderers; in doing so, however, it "placed substantive limitations upon the Governor's exercise of that judgment and discretion" by requiring him to rely on the same facts and factors that control the Board's decision and subjecting him to the same legal constraints imposed upon the Board. *Id.* at 663-64.

review is "limited to the same considerations [and factors] that inform the Board's decision" citing *Rosenkrantz*, 29 Cal.4th at 660-61), and *id.* at 739-740 (Governor in reviewing parole grant can only consider evidence before the Board that made the grant being reviewed).

California's parole law thus gives life prisoners an "expectation of parole" that is constitutionally protected. *Dannenberg*, 34 Cal.4th at 1094. That expectation of parole includes the expectation that the prisoner will not be denied parole based on the circumstances of the commitment offense and other static factors from the distant past once he has demonstrated consistent reform and rehabilitation as evidenced by good behavior, academic and/or vocational accomplishments, therapies to address offense dynamics and causes, psychological health as described by psychological evaluations that are a required part of the parole authority's process and must be considered by the decisionmaker, *see In re Lawrence*, 44 Cal.4th at 1213, and maintenance of a support network and realistic parole plans outside the prison. *See Lawrence*, 44 Cal.4th at 1211-1212, 1221-1227; *see also* Cal. Code Regs., tit. 15 § 2402.

REASONS THE PETITION SHOULD BE DENIED

The petition should be denied because the state courts' decisions affirming the parole authority's denial of parole have arbitrarily deprived Johnson of his state-created, federally protected liberty interest in parole under California's parole law as explained by the California Supreme Court. *See* Cal. Penal Code § 3041; *In re Lawrence*, 44 Cal.4th at 1211-1212, 1227 (as detailed, *ante*, at pp. 3-6; *see also Beal v. Mississippi*, 312 U.S. 45, 50 (1945) (state courts are final arbiters of meaning of state laws).

Petitioners do not dispute that California parole law creates a liberty interest in parole that is protected by the Due Process Clause. See Petition, "Question Presented." The statute establishing parole in California, Penal Code § 3041, creates such a liberty interest under constitutional rules clearly established by this Court. *See, e.g., Wilkinson v. Austin*, 545 U.S. 209 (2005); *Sandin v. Conner*, 515 U.S. 472 (1995); *Bd. of Pardons v. Allen*, 482 U.S. 369 (1987); *Greenholtz v. Inmates of Neb. Penal and Corr. Complex*, 442 U.S. 1 (1979). Such was recognized by the court below.

This Court's own precedents establishing Johnson's federal constitutional right to be free of an arbitrary deprivation of parole include *Schware v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957), *Superintendent v. Hill*, 472 U.S. 445 (1985), and *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980). Whether the court below specifically relied on those precedents in granting habeas corpus or not, its ultimate decision granting relief was correct. This Court can and should deny the petition for writ of certiorari because the correctness of the decision below when supported on any ground, even if not specifically relied upon by the court of appeals, can and should be allowed to stand.

This Court's recent decision in *Swarthout v. Cooke*, 562 U.S. ___, 178 L.Ed.2d 732 (2011) does not control this case for a number of reasons. *Swarthout* is a *per curiam* summary disposition made without benefit of briefing and oral argument that need not be followed here, especially because the core issue in this case is the State's arbitrary deprivation of a federally protected liberty-interest in parole. This is not a case where habeas corpus was granted because the federal court determined that the state courts erred in applying a state-law standard of evidentiary sufficiency

for state parole decisions, as phrased in Petitioners' "Question Presented," but a question of federal constitutional protection against a State's arbitrary deprivation of liberty. The specific issue in this unpublished, memorandum decision in the court of appeals is a narrow one under California's unique parole statute. It has virtually no application beyond California's borders. For that additional reason it does not warrant further review.

ARGUMENT

THE NINTH CIRCUIT DECISION IN JOHNSON'S CASE ACHIEVED THE OUTCOME DIRECTED BY THIS COURT'S CLEARLY ESTABLISHED PRECEDENT AND DOES NOT VIOLATE ANY PRINCIPLES OF FEDERALISM OR COMITY.

A. California Law Gives Indeterminate Life Prisoners a Liberty Interest in a Parole Date That Is Protected by Due Process.

The State asserts that "it is questionable whether a California life prisoner has a constitutionally protected entitlement in parole release." Petition at 26. The State has not asked this Court to review that question. The constitutionally protected expectation of parole release for California life prisoners, however, is clear beyond dispute under *Allen*, 482 U.S. 369, and *Greenholtz*, 442 U.S. 1. As acknowledged in *Swarthout*, 178 L.Ed.2d at 736, the Ninth Circuit holding that California law creates a liberty interest in parole is a reasonable application of established Supreme Court precedent, citing *Allen* and *Greenholtz*.

In *Allen* and *Greenholtz*, the Court held that a State creates a constitutionally protected interest in parole when it mandates parole upon the showing of a specified substantive predicate or permits denial of parole

only upon a showing of a specified substantive predicate. *See Allen*, 482 U.S. at 378 n.10 ("shall/unless" language of Montana parole statute creates a liberty interest even under the "most restrictive interpretation" of *Greenholtz*). The Ninth Circuit, in its opinion below, followed this Court's precedent by reference to *Hayward v. Marshall*, 603 F.3d 546 (9th Cir. 2010) (en banc), which affirmed that California's parole statute creates a constitutionally protected liberty interest in parole under *Greenholtz* and *Allen*. *Hayward*, 603 F.3d at 561; *see* Petn. App. 92a-96a. This Court in *Swarthout* acknowledged as much. *Swarthout*, 178 L.Ed.2d 736. And, as the State admits, "This Court in *Greenholtz*, 442 U.S. at 12, treated the question [whether the State created a liberty interest in parole protected by due process] as one of a negative inference drawn from state statutes and regulations where they compel a certain outcome based upon a certain factual showing." Petition at 25. As set forth above, California's statutes and regulations "compel a certain outcome" – the setting of a parole date – "upon a certain factual showing" – that the prisoner is not currently dangerous pursuant to detailed criteria guiding that consideration, such that his release would pose an unreasonable risk to public safety.

Petitioners' suggestion that *Sandin v. Conner*, 515 U.S. 472 (1995) applies in the context of California's parole scheme, and undercuts a conclusion that California's scheme creates a constitutionally protected liberty interest in parole, need only be briefly acknowledged in order to be rejected. *See Swarthout*, 178 L.Ed.2d 736; *see also INS v. St. Cyr*, 533 U.S. 289, 345-46 (2001) (Scalia, J., dissenting) (explaining, without contradiction, that the Court has "recognized the existence of a due process liberty interest when a State's statutory parole procedures prescribe that a

prisoner 'shall' be paroled if certain conditions are satisfied," citing *Allen*, 482 U.S. at 370-71; *Greenholtz*, 442 U.S. at 12).

B. This Court's Cases Clearly Establish That Due Process Requires "Some Evidence" to Support a Deprivation of a Liberty Interest, and *Greenholtz* Is Not to the Contrary.

Once a liberty interest has been established, one question becomes what process is due. Here, the Ninth Circuit held that California may not deprive Johnson of this liberty interest if the decision to do so is arbitrary. That court determined that the Governor's decision in 2001 denying parole was arbitrary because it was not supported by "some evidence" that Johnson remained dangerous.

A federal requirement of "some evidence" has long stood as the federal constitutional floor that must be present to meet the due process concern that governmental action depriving an individual of a protected liberty interest be fundamentally fair in substance. Nearly a century ago, the Court held: "A finding without evidence is arbitrary and baseless .... Such authority ... is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercises of power." *ICC v. Louisville & Nashville R.R.*, 227 U.S. 88, 91 (1913); *see also Jackson v. Virginia*, 443 U.S. 307, 314 (1979) (the requirement of some evidence "secures the most elemental of due process rights: freedom from a wholly arbitrary deprivation of liberty"). The need for at least some evidence thus is inherent in the finding of any protected liberty interest; it is only where a prisoner has no interest in liberty protected by due process that the State may take action against him without any supporting evidence—that is, "for whatever reason or for no reason at all." *Meachum v. Fano*, 427 U.S. 215,

228 (1976) (transfer of inmate to different prison does not infringe on a liberty interest protected by due process).

This Court's jurisprudence over the last century has established that, at the very least, some evidence must support any action depriving an individual of a substantial liberty interest protected by due process:

> In a variety of contexts, the Court has recognized that a governmental decision resulting in the loss of an important liberty interest violates due process if the decision is not supported by any evidence. *See, e.g., Douglas v. Buder*, 412 U.S. 430, 432 (1973) (per curiam) (revocation of probation); *Schware v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957) (denial of admission to bar); *United States ex rel. Vajtauer v. Commissioner of Immigration*, 273 U.S. 103, 106 (1927) (deportation).

Hill, 472 U.S. at 455; see also *Dickenson v. United States*, 346 U.S. 389 (1953) (requiring some "basis in fact" as a matter of due process to support Selective Service classifications); see generally Neuman, *The Constitutional Requirement of "Some Evidence,"* 25 San Diego L. Rev. 631, 688 (1988) (chronicling since 1912 "the Court's continuing perception of a need to scrutinize decisions for 'some evidence' that supports them" when they deprive an individual of a protected liberty interest).

Swarthout in a summary statement nonetheless indicates that a prisoner such as Johnson denied parole under a state-law that creates a federally protected due process liberty interest in parole, is entitled under the United States Constitution to the process described in *Greenholtz*, 442 U.S. at 16, and nothing more. *Swarthout*, 178 L.Ed.2d at 736. As interpreted there, those rights are notice, an opportunity to be heard, and a statement of reasons for the parole denial. *Id.* But *Swarthout* is only

weakly precedential on that point, and need not be applied in this case to impel a grant of certiorari.

First, although the liberty of so many life prisoners in California was at stake, *see* Petition p. 20, the *Swarthout per curiam* summary disposition issued without the benefit of briefing or oral argument. The precedential value of its holding is, therefore, diminished. *See, e.g., Gary v. Mississippi*, 481 U.S. 648, 651 n.1 (1987) ("The Court, of course, at times has said that summary action here does not have the same precedential effect as does a case decided upon full briefing and argument," citing *Edelman v. Jordan*, 415 U.S. 651, 671 (1974) (holding that "three [prior United States Supreme Court] summary affirmances obviously are of precedential value in support of the contention that the *Eleventh Amendment* does not bar the relief awarded by the District Court in this case. Equally obviously, they are not of the same precedential value as would be an opinion of this Court treating the question on the merits. Since we deal with a constitutional question, we are less constrained by the principle of stare decisis than we are in other areas of the law"); Gressman *et al.*, Supreme Court Practice 305 & n.94 (9th ed. 2007) (noting that "decisions explained in a written opinion but rendered without full briefing and argument" are "entitled to some weight, but to less than fully articulated decisions" and that "[t]his may mean ... no more than that the Justices will follow such holdings whether they agree with them, but not otherwise").

Second, *Swarthout* does not control the disposition in this case. It is true that the question presented in *Swarthout* was the same as presented in this case:

> QUESTION PRESENTED: Whether a federal court may grant habeas corpus relief to a state prisoner based on its view that the state court erred *in applying the state-law standard* of evidentiary sufficiency governing state parole decisions. (Emphasis added.)[2]

Because that question did not put in issue the federal constitution's historical protection against deprivation of a protected liberty interest, the Court without the benefit of briefing on the merits or argument, answered that particular narrow question in the negative in its *per curiam* summary disposition: "In granting habeas relief based on its conclusion that the state courts had misapplied California's 'some evidence' rule, the Ninth Circuit must have assumed either that federal habeas relief is available for an error of state law, or that correct application of the State's "some evidence" standard is required by the federal Due Process Clause. Neither assumption is correct." *Swarthout*, 178 L.Ed.2d at 736.

That disposition should not control here, for there are broader constitutional issues at stake. This Court can uphold the decision of the court of appeals granting habeas corpus even if that court relied upon a different basis in doing so. *See Leecan v. Lopes*, 893 F.2d 1434, 1439 (2d Cir. 1990) ("[W]e are free to affirm an appealed decision on any ground which finds support in the record, regardless of the ground upon which the trial court relied[,]" citing *Helvering v. Gowran*, 302 U.S. 238, 245 (1937)) (cert. denied, 496 U.S. 929 (1990). Even more so can it decline to grant certiorari on that basis.

The question whether a right arises in California under the United States Constitution to parole in the absence of some evidence of future

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[2] *See* 2010 U.S. Briefs 333; 2010 U.S. S. Ct. Briefs LEXIS 2517, first page.

dangerousness has already been decided in the affirmative by this Court's precedents. As set forth *ante* at 10-11, and further explained below, several Supreme Court cases provide firmly established authority that the Due Process Clause of the United States Constitution requires "some evidence" to support the Governor's action depriving Johnson of his parole grant, given the federally protected liberty interest in parole created by California's statutory and regulatory parole scheme. *Swarthout* held only that it was not the business of federal habeas courts to determine whether errors of state law occurred. Its assertion in this regard that "[n]o opinion of ours supports converting California's 'some evidence' rule into a substantive federal requirement," 178 L.Ed.2d at p. 737, does not detract from Johnson's argument here that the Due Process Clause of the United States Constitution itself requires that the decision depriving Johnson of his parole grant be supported by "some evidence" that he remains an unreasonable risk of danger to the public if released. In any event, the precedential effect of the broad statements in *Swarthout* indicating the rights under *Greenholtz* are all that need be afforded Johnson, *see id.* 178 L.Ed.2d at 736, and the Court's failure to recognize that its own precedents under the Due Process Clause require that "some evidence" support the denial of parole to him, should have minimum precedential effect where the case was decided in a *per curiam* summary disposition without briefing and oral argument.

In *Schware v. Board of Bar Examiners*, 353 U.S. at 239, this Court held that, under the due process clause of the United States Constitution, "[e]ven in applying permissible [discretionary] standards, officers of a State cannot exclude an applicant [for reinstatement to the bar to practice law]

when there is no basis for their finding that he fails to meet these standards ...." 353 U.S. at 239. There is simply no basis on which this can be said for applicants to become licensed attorneys, but not for applicants seeking freedom from incarceration. Again, the very essence of due process is "the protection of the individual against arbitrary action." *Ohio Bell Tel. Co. v. P.U.C.*, 301 U.S. 292, 302 (1937). Freedom from custody or imprisonment "has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992).

Schware was cited in *Superintendent v. Hill*, 472 U.S. at 453-55, a prison good-time-credit case implicating liberty, as a basis for the decision in *Hill* that application of the "some evidence" standard was indeed an independent requirement imposed by the Due Process Clause. *See id.* ("revocation of good time does not comport with the minimum requirements of procedural due process unless the findings of the prison disciplinary board are supported by some evidence in the record") (citation and internal quotation marks omitted). The majority in *Hayward*, upon which the court of appeals relied in Johnson's case to grant habeas corpus, dedicated a great deal of dicta to distinguishing a parole grant from the taking of good-time credits, primarily relying on the ground that the latter does not involve predictive, discretionary decisionmaking. *See* 603 F.3d at 555-61. The distinctions discerned by the *Hayward* majority, however, were entirely irrelevant to this Court's rationale for viewing the some evidence standard as mandated by the due process clause in the first place. Simply put, that clause does not permit the arbitrary deprivation of a protected liberty interest by a state. As *Hill*'s citation of *Schware* makes

clear, that is every bit as much so when the standard is an elastic one that requires the exercise of discretion and subjective analysis:

> The requirements of due process are flexible and depend on a balancing of the interests affected by the relevant government action. Where a prisoner has a liberty interest in good time credits, the loss of such credits threatens his prospective freedom from confinement by extending the length of imprisonment. Thus the inmate has a strong interest in assuring that the loss of good time credits is not imposed arbitrarily. Requiring a modicum of evidence to support a decision to revoke good time credits will help to prevent arbitrary deprivations without threatening institutional interests or imposing undue administrative burdens. In a variety of contexts, the Court has recognized that a governmental decision resulting in the loss of an important liberty interest violates due process if the decision is not supported by any evidence. *See, e.g., Douglas v. Buder*, 412 U.S. 430, 432 (1973) (*per curiam* (revocation of probation); *Schware v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957) (denial of admission to bar); *United States ex rel. Vajtauer v. Commissioner of Immigration*,273 U.S. 103, 106 (1927) (deportation).

Superintendent v. Hill, 472 U.S. at 454-55 (parallel citations omitted); *see also Swarthout*, 178 L.Ed.2d at 738 (Ginsburg, J., concurring) ("to comply with due process, revocation of a prisoner's good time credits must be supported by "some evidence." If California law entitled prisoners to parole upon satisfaction of specified criteria, then *Hill* would be closely in point. The Ninth Circuit, however, has determined that for California's parole system, as for Nebraska's, *Greenholtz v. Inmates of Neb. Penal and Correctional Complex* [citation] is the controlling precedent. [Citation.] Given that determination, I agree that today's summary disposition is in order.") But as Johnson has explained, this Court need not grant certiorari in Johnson's case on the ground that the court below relied on *Hayward*

and its particular analytical structure, now discredited in *Swarthout*. Where this Court's own precedents provide for the same decision reached by the court below, as here, it should deny certiorari.

As is apparent, *Hill*'s rationale in no way was dependent on the notion that good-time credits did not involve subjective, predictive decisionmaking. It was, rather, the threat to an inmate's "prospective freedom from confinement by extending the length of imprisonment" that triggered the imposition of the some evidence standard to provide protection against the state's arbitrary decisionmaking, precisely the same threat that exists in parole cases. There is every bit as much predictive and subjective discretion exercised by the New Mexico Bar Examiners in deciding whether an applicant to the state bar is of sufficiently good moral character, at issue in *Schware* and cited as a basis for the decision in *Hill*, as is exercised by the California parole board in determining whether a prisoner poses an unreasonable risk of danger to the public if released; that, however, did not stop this Court from imposing the "some evidence" standard in that case. *See Schware*, 353 U.S. at 248 (Frankfurter, J., concurring) ("No doubt satisfaction of the requirement of moral character involves an exercise of delicate judgment on the part of those who reach a conclusion, having heard and seen the applicant for admission, a judgment of which it may be said ... that it expresses an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions, impressions which may lie beneath consciousness without losing their worth") (citation and internal quotation marks omitted). There is, therefore, no basis to distinguish the foregoing some-evidence/due-process

cases decided by this Court from Johnson's case on the basis that there is discretion inherent in parole decisionmaking that was not present in *Hill*.

Furthermore, in *Board of Pardons v. Allen*, 482 U.S. 369 (1987), this Court did not consider *Greenholtz v. Inmates of Nebraska Pen. & Corr. Complex*, 442 U.S. 1, to limit rights in the parole context like Johnson's to notice, an opportunity to be heard, and a statement of reasons for a denial. In *Allen*, the Court determined that a liberty interest in parole was created by the Montana statute just as in *Greenholtz*. *Allen*, 482 U.S. at 381. In affirming the lower court's decision to remand the case to the district court for consideration of "the nature of the process which is due [the parole applicants]" and "whether Montana's present procedures accord that due process," *see Allen*, 482 U.S. at 372, the Court demonstrated that *Greenholtz* did not create a "one size fits all" analysis of due process for parole determinations. Otherwise, it would have ordered that, on remand, the district court need determine only that the Montana prisoners were afforded the three due process rights listed in *Greenholtz* for compliance with federal due process.

All of these cases, i.e., *Schware, Hill* and *Allen*, provide established Supreme Court precedent that "some evidence" is required to support Johnson's denial of parole. This Court has stated in *Williams v. Taylor*, 529 U.S. 362, 407 (2000) that relevant precedents include not only bright-line rules but also the legal principles and standards flowing from precedent. Moreover, here there is an additional basis, based on this Court's precedents, to deny the petition for writ of certiorari. In *Hicks v. Oklahoma*, 447 U.S. at 346, this Court held, in response to the State's

argument that "all that is involved in this case is the denial of a procedural right of exclusively state concern":

> Where ... a State has provided for the imposition of criminal punishment in the discretion of the trial jury, it is not correct to say that the defendant's interest in the exercise of that discretion is merely a matter of state procedural law. The defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion, *cf. Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979), and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State. See *Vitek v. Jones*, 445 U.S. 480, 488-489, 100 S.Ct. 1254, 1261, 63 L.Ed.2d 552, citing *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935; *Greenholtz v. Nebraska Penal Inmates, supra*; *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484. In this case Oklahoma denied the petitioner the jury sentence to which he was entitled under state law, simply on the frail conjecture that a jury might have imposed a sentence equally as harsh as that mandated by the invalid habitual offender provision. Such an arbitrary disregard of the petitioner's right to liberty is a denial of due process of law.

Here, the State of California has provided for the denial of parole only when the parole applicant remains currently dangerous, and that finding is supported by "some evidence." Like Hicks, Johnson has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent a denial of parole is supported by some evidence that he is currently dangerous, and that liberty interest "is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State." *See Hicks*, 447 U.S. at 346. In this case, the state court decisions denied relief solely on the basis that Johnson's commitment offense was egregious. The California "some

evidence" standard precludes a finding of current dangerousness based on an ancient commitment offense alone when the parole applicant has demonstrated rehabilitation over many, many years. *See In re Lawrence*, 44 Cal.4th at 1211-1212, 1227. California has therefore arbitrarily and unreasonably deprived Johnson of a decision denying parole based not solely on the facts of the commitment offense, but rather based on some evidence of current dangerousness. Like Hicks, Johnson's right to parole and liberty were arbitrarily disregarded by California, denying him due process of law under the United States Constitution.

For all of the foregoing reasons, the decision of the Ninth Circuit in Johnson's case is correct under this Court's precedents. The petition for writ of certiorari should therefore be denied.

C. The Ninth Circuit Afforded the State Court Adjudications the Deference Required by 28 U.S.C. § 2254.

Petitioner assumes arguendo "that the state court decisions ... were 'incorrect' or 'unreasonable' in finding 'some evidence' to support the denial of parole." Petition at 29-30.[8] Petitioner nevertheless asserts that the Ninth Circuit decisions "erred under § 2254 in granting relief" because Johnson's constitutional claim that such a substantively arbitrary deprivation of his liberty interest in parole violated due process "was a novel one of a type never before endorsed by this Court as applicable to the question of parole suitability." Petition at 30. That assertion fails.

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[8] Thus, the State's claim that the habeas relief granted by the Ninth Circuit was "based on its own view of a state prisoner's suitability for parole," Petition at 31, is irrelevant. It also has no support in the record.

As noted above in part B, *ante*, the jurisprudence of this Court has clearly established that due process requires, at a minimum, some evidence to support deprivation of an inmate's protected liberty interest. That these cases arise in contexts other than parole is irrelevant. The "important liberty interest in *Hill*" concerned the shortened prison sentence achieved by good time, *i.e.*, "[the inmate's] prospective freedom from confinement." *Hill*, 472 U.S. at 454. It breaks no new ground to apply the due process requirement of some evidence to a California life prisoner's more dramatically shortened sentence and prospective freedom from confinement represented by a grant of a parole date. In *Hill*, Massachusetts law provided that the State could deprive the prisoner of his liberty interest in his prospective freedom only if there was some evidence of his misconduct. Here, California law provides that the State may deprive the prisoner of his liberty interest in his prospective freedom only if he is currently dangerous.

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CONCLUSION

For these reasons, the Court should deny the petition for writ of certiorari. If it should grant certiorari, it should not enter a summary disposition, or "grant, reverse, and remand," but should give plenary consideration to the claims after briefing and oral argument.

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Respectfully submitted,

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